

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, <i>ex rel.</i> W.A. DREW)	
EDMONDSON, in his capacity as ATTORNEY)	
GENERAL OF THE STATE OF OKLAHOMA,)	
<i>et al.</i>)	
)	
Plaintiffs)	
)	
vs.)	05-CV-00329-GKF-PJC
)	
)	
TYSON FOODS, INC., <i>et al.</i>)	
)	
Defendants)	

DEFENDANTS' JOINT RESPONSE TO
PLAINTIFFS' MOTION IN LIMINE TO EXCLUDE
EXPERT TESTIMONY OF WAYNE GRIP (Dkt. No. 2059)

Defendants Tyson Foods, Inc., Tyson Poultry, Inc., Tyson Chicken, Inc., Cobb-Vantress, Inc., Cal-Maine Foods, Inc., Cal-Maine Farms, Inc., Cargill, Inc., Cargill Turkey Production, LLC, George's, Inc., George's Farms, Inc., Peterson Farms, Inc. and Simmons Foods, Inc. hereby submit their joint Response to *Plaintiffs' Motion in Limine to Preclude Expert Testimony of Defendants' Witness Wayne Grip* (Dkt. #2059) as follows:

I. Introduction

Wayne Grip is a testifying expert hired by the defendants in the areas of photo interpretation and photogrammetry. He has submitted two separate expert reports in this proceeding. The first was submitted in October, 2008 (Ex. "A"), and the second was submitted in January, 2009. (Ex. "B") The Plaintiffs have challenged only the opinions set out in the second expert report.¹ Specifically, the Plaintiffs challenge Mr. Grip's opinion in

¹ In his first expert report Mr. Grip used historical and contemporary aerial photographs to map the historical meanders of the Illinois River and the extent of recent commercial

which he quantified the volume of material which has eroded from the banks of the Illinois River, or which has been washed into the river on occasions when the river has abruptly changed course since 1972.² In other words, Mr. Grip quantified the volume of material that was actually eroded by the river itself. He did not address in any manner any volume of material which might have been washed to the river by rainfall events or other means.

Photogrammetry is “the science of gathering dimensions from photographs.” See, Heatherly vs. Alexander, 421 F.3d 638, 645 (8th Cir. 2005). Photogrammetry from aerial photography is, at its core, a surveying tool used for many different purposes.

Photogrammetry utilizes highly specialized cameras, airplanes, stereoplotters, and software to produce three dimensional images of the land surface being studied. The images which are produced allow the precise measurement of the area and vertical relief of the land surface being studied. In his first expert report, which tracked the meanders of the Illinois River, Mr. Grip identified his area of expertise as “photogrammetry and photointerpretation.” (Ex. “A”, p. 4 (unnumbered)) The Plaintiffs did not challenge, and have not challenged, anything about that first expert report. The Plaintiffs did not challenge the science of photo interpretation or photogrammetry, nor did the Plaintiffs challenge Mr. Grip’s qualifications as an expert in these fields. No challenge to the science or Mr. Grip’s qualification as an expert in those areas has been raised in the present motion regarding either of his expert reports or his testimony.

One of the common uses for photogrammetry from aerial photography is topographic mapping. Other uses include such matters as measuring the volume of material

development in the Arkansas portion of the IRW. The Plaintiff has not challenged any aspect of the first expert report. This Response will refer to the first expert report only to the extent necessary to explain Mr. Grip’s qualifications and experience.

² Mr. Grip’s report shows that since 1972, the volume of bank erosion plus sediment moved as the Illinois River abruptly changed course between Lake Tenkiller and the state line is 416,816,928 cubic feet. (Ex. “B”, p. 3)

needed for “cut and fill” projects commonly associated with construction or other similar activities. In such a “cut and fill” project, the three dimensional photogrammetry measurements show the length, width, and height (vertical relief) of the area being studied. Calculations of the length-times-width-times-height variety are then made to calculate the volume of materials needed to be removed or added. The calculations are necessarily complex because of the unlevel and uneven surfaces which comprise the area dimensions, but the calculations are still relatively straightforward.

In the present action, Mr. Grip was asked to quantify the volume of dirt or other material which has eroded from the banks of the Illinois River or has been lost to meanders of the river over time. He did this in the same manner as any photogrammetrist would employ to compute the volume of material in a “cut and fill” project. He started with historical aerial photographs of the Illinois River. He then used aerial photography and photogrammetry to provide three dimensional models of the river and the surrounding land over a period of time. Then he used terrain modeling software commonly utilized by photogrammetrist to compute the volume of dirt and other materials which have disappeared over time because of the meandering of the river. The methodology used by Mr. Grip is the industry-standard used generally by experts in photogrammetry.

The Plaintiffs’ main argument is a straw man challenge to Mr. Grip’s second expert report. The Plaintiffs incorrectly characterize Mr. Grip’s Report as an exercise in fluvial geomorphology and then base their challenge on the fact that he is not a fluvial geomorphologist.³ A fluvial geomorphologist might be required in order to explain the processes which led to the erosion or to explain the fate and transport of the eroded material, but Mr. Grip was not asked to, and did not, opine on either of those matters. Instead, he

³ Fluvial geomorphology is generally defined as the study of the processes and pressures operating on river systems.

simply quantified the amount of the eroded material using photogrammetry and terrain modeling. That analysis and calculation is the sum total of his second expert report.

Other expert witnesses may use Mr. Grip's volumetric calculations to opine on the fate and transport of the eroded material or the effect the erosion has on water quality in the Illinois River or Lake Tenkiller, but Mr. Grip has not and will not. The only assumption Mr. Grip made was that the material which was eroded by the river actually eroded into the river. One hardly needs fluvial geomorphology expertise to reach that conclusion.

Mr. Grip's methodology for quantifying "cut and fill" volume through photogrammetry is time-tested and highly reliable. He is highly qualified in photogrammetry, and his testimony will greatly assist the jury in gaining a more complete understanding of the nature and volume of one significant source of potential pollutants to the Illinois River.

II. Legal Standard

Federal Rule of Evidence 702 controls the admissibility of Mr. Grip's testimony.

The Rule provides as follows:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods to the facts of the case.

If these three conditions are met, the testimony should be admitted. Trial courts are charged with ensuring that expert testimony presented to the jury is both relevant and reliable. See, Attorney General of Oklahoma v. Tyson Foods, Inc., __ F.3d __, 2008 WL 1313216, at *6 (10th Cir. 2009); Dodge v. Cotter, 328 F.3d 1212, 1221 (10th Cir. 2003). In order to do this, the Court must first "determine if the expert's proffered testimony has a

reliable basis in the knowledge and experience of his or her discipline.” Norris v. Baxter Healthcare Corp., 397 F.3d 878, 883-84 (10th Cir. 2005) (quotations, ellipses omitted).

Then, the Court must determine whether the challenged experts’ reasoning and methodology is reliable. *Id.*, at 884. If an expert’s testimony is grounded in the expert’s area of specialized knowledge, based on sound data and reliable methodology, and soundly applied to the facts of the case, the testimony should be admitted.

III. Argument

Mr. Grip has submitted two separate expert reports in which he used photogrammetry to arrive at his conclusions. The Plaintiffs have not challenged the reliability of the science of photogrammetry or Mr. Grip’s manifest expertise in photointerpretation and photogrammetry. The Plaintiffs’ have effectively admitted both the reliability of the process and Mr. Grip’s expertise in the disciplines. This alone should be dispositive of the Plaintiffs’ motion. Just as evidence must be relevant, a party’s challenge to testimony must also be relevant to the actual circumstances, not an imagined circumstance.

Instead of challenging Mr. Grip on his actual expertise or on the reliability of photogrammetry, the Plaintiffs have chosen to argue that Mr. Grip’s measurement of eroded materials amounts to opining in the separate discipline of fluvial geomorphology. (Pltf’s Brief, pp. 2, 5) This is akin to arguing that using aerial photography and photogrammetry to calculate the volume of material in a hill is an exercise in fluvial geomorphology merely because the hill is adjacent to a river.

The Plaintiffs also argue that Mr. Grip is somehow not qualified because he has not published peer-reviewed articles in the discipline of geology. (Pltf’s Motion, pp. 2, 5) The basis for this challenge is not clear. Mr. Grip’s second expert report simply measures the amount of dirt or other materials which over time the Illinois River has washed into itself.

Geology is not an issue. Aerial photography, photogrammetry, and terrain modeling are all that matter in his second expert Report. The “geology” argument is tantamount to arguing that Mr. Grip is not qualified to quantify material in a “cut and fill” construction job because Mr. Grip is not a structural engineer. The Plaintiffs’ protests about geology and fluvial geomorphology are meaningless and betray the weakness of their position.

A. Photogrammetry Is a Recognized and Reliable Science

Photogrammetry has long been recognized as a reliable science by federal courts. See, Canal Authority of Florida v. Callaway, 489 F.2d 567, 571 (5th Cir., 1974) (Army Corp. of Engineers used photogrammetry used to help establish environmental impact); Waste Management of Alameda County, Inc. v. East Bay Regional Park District, 135 F.Supp.2d 1071, 1081 (N.D. CA. 2001)(photogrammetry used to calculate slope of land); Napeahi vs. Wilson, 1996 U.S. Dist. LEXIS 21851, 18 (D.C. HI, 1996)(photogrammetry showing tidal pond elevation was reliable); Goodman vs. Crystal River, 669 F.Supp. 394, 396 (M.D. FL, 1987)(photogrammetry conclusive in establishing existence of outlet channel); Missouri vs. Department of Army Corp. of Engineers, 526 F.Supp 660, 672 (W.D. MO, 1980)(U.S. Corp. of Engineer’s expert’s photogrammetry testimony accepted to establish relative amount of river bank erosion. Witness was also expert in river hydraulics and testified about regular rise and fall of river contributing to erosion.);

A good description of the science of photogrammetry is found in Reichhold, Inc. vs. U.S. Metals Refining Company, 2007 U.S. Dist. Lexis 14000 (D.C.N.J, 2007)(admitting expert testimony derived from photogrammetry). There the Court explained that,

[p]hotogrammetry involves taking precise measurements from sets of stereo pairs of aerial photographs. A stereo pair of photographs is a set of two photographs in which the image captured overlaps at least fifty percent. The two photographs are taken moments apart, from an airplane above the area to be measured, and because they are taken from different points along the flight path, each photo shows a slightly different perspective. This difference

in perspective is known as a parallax. Parallax is the reason why people who can see from both of their eyes are able to see three-dimensionally and judge differences between objects. The lines of sight from each of the eyes to the object form an angle known as the “parallactic angle.” In photogrammetry, the same type of analysis that the brain performs is conducted deliberately and quantitatively by measuring the parallactic angles represented by the different positions of the same point in a pair of stereo photographs. (Internal cites and references omitted)

Photogrammetry is widely recognized by courts as an established and reliable science which accurately measures the length, width, and vertical relief of physical features on the landscape. Beyond the acceptance of photogrammetry by courts, governmental agencies have long used the science for topographical mapping and other similar tasks. Similarly, the private sector has long used photogrammetry from aerial photography for a wide variety of purposes. If any meaningful challenge to the science of photogrammetry could be mounted, the Plaintiffs would have made such a challenge. The absence of such a challenge is dispositive of the issue if there is such an issue.

B. Mr. Grip Is A Recognized Expert in Photo Interpretation and Photogrammetry

As shown in Attachment “C” to his first expert report (Response ex. “B”), Mr. Grip has testified as an expert in the field of photointerpretation and photogrammetry in ten federal and state court cases. The same Attachment “C” shows that he has also testified as an expert in the field of photointerpretation and photogrammetry in depositions in numerous other cases. He has been continuously employed in the field since 1986. He has been an owner and employee of Aero-Data, Inc., a photo interpretation and photogrammetry enterprise, since 1987. He first worked in the discipline as a U.S. Air Force officer in the capacity of photo interpreter and cartographer for the Strategic Air Command from 1966 to 1970. Mr. Grip’s extensive experience in the field of photogrammetry no

doubt accounts for the Plaintiffs' failure to challenge his expertise. Again, his expertise is admitted for failure to challenge.

C. Mr. Grip's Testimony Is Based Upon Sufficient Facts or Data

As explained in his first Expert Report, (Response Ex. "A", p. 2-3) and incorporated second Expert Report, (Response Ex. "B", p. 1), Mr. Grip obtained historical aerial photographs of the Illinois River from Lake Tenkiller to the Oklahoma-Arkansas state line. His company then flew a photo mission over this same stretch of the river to take the stereoscopic photographs he used to compare against the historic aerial photographs. All of these photographs were used to make his calculations.

His testimony is, therefore, based on an examination of the entire reach of the Illinois River from Lake Tenkiller to the state line.⁴ His opinion is expressly limited to this reach of the river. (Response Ex. "B", p. 4) His photographic record of this reach of the river is complete. His opinion is based on the examination of all meanders in this reach of river and the calculation of the volume of materials lost to the river in this entire reach. There are no gaps in the analysis. All of the facts necessary to support the opinion were known to Mr. Grip, used by Mr. Grip, and well documented by Mr. Grip in his second expert report.

D. Mr. Grip's Methodology Is Sound

While the Plaintiffs have not challenged the science of photogrammetry or Mr. Grip's expertise in the discipline, the Plaintiffs have made an unenthusiastic challenge to his methodology. It is found at page 5 of the Plaintiffs' motion. There, in one clause of one

⁴ Mr. Grip explained, at p. 1 of Exhibit "B" that he did not continue the exercise past the state line because he found "little evidence of active meanders past the state line" in his work for his first expert report. To the extent that there are small meanders in the Arkansas portion of the Illinois River, Mr. Grip's total quantity opinion does not include some portion of the total materials which are actually washed by the river into the river along the total length of the river. The second expert report explains this.

sentence, the Plaintiffs argue that Mr. Grip “did not do any onsite investigations or measurements to confirm the accuracy of his interpretations.” The reach of river from Lake Tenkiller to the state line is fifty nine miles long. (Response Ex. “B”, p. 4) The Plaintiffs’ criticism of Mr. Grip’s methodology is that he did not walk the fifty nine miles of Oklahoma river bank and take hand measurements to confirm his calculations of volume. Exhibit 1 to Plaintiffs’ motion consists of excerpts from Mr. Grip’s deposition. It is at page 42 of Exhibit 1 that the relevant exchange is found. Mr. Grip is asked whether his methodology consisted of “actually sitting on the ground, looking at it or measuring it, that was not done?” In response, Mr. Grip explained that, “[p]eople hire me to do that so they don’t have to go out on the ground and do that themselves.”

The reality, of course, is that if actual on-the-ground hand measurements were required to validate the highly precise photogrammetry measurements, no court would have ever accepted expert testimony regarding photogrammetry and the measurements derived therefrom. The discipline of photogrammetry itself would not exist if the science did not produce reliable results. The Plaintiffs’ one-clause-in-one-sentence challenge to Mr. Grip’s methodology should be rejected summarily.

E. Mr. Grip’s Testimony Is Relevant

The last argument the plaintiffs make is that Mr. Grip’s volume quantifications are not relevant. The entirety of the Plaintiffs’ argument on relevance is found in one sentence at page 6 of its motion, *viz.*:

And third, given that Mr. Grip cannot relate the movement of sediments to the movement of nutrients in the Illinois River, Mr. Grip’s opinions as to the volume of sediments “relocated” in the Illinois River are in any event irrelevant. (internal cites omitted)

Mr. Grip’s second report does not attempt to “relate the movement of sediments to the movement of nutrients” because that is the task left for other ecological experts. Mr. Grip

was not asked to opine on that topic, and he has not done so and will not do so. That inquiry falls within the expertise of other defense experts. The fact that Mr. Grip will not be the one to explain that relationship, however, has nothing to do with the relevance of Mr. Grip's testimony. No one disputes that bank erosion and erosion caused by abrupt changes in the river course are potential contributors of phosphorus to the Illinois River. To date the Plaintiffs have avoided the issue by declaring, without any foundation, that the amount of such erosion is too small to matter. Mr. Grip's testimony will dispel that false notion. His testimony will quantify the magnitude of river-caused erosion into the Illinois River. The significance of the erosion will be explained by others, but the volume of the eroded material is plainly relevant and important. This information will be critical to having a properly informed jury in this action.

Conclusion

It is plain that Mr. Grip's Expert Reports and testimony easily satisfy the requirements of Rule 702. Because the Plaintiffs did not directly challenge the science of photogrammetry, Mr. Grip's methodology, or Mr. Grip's expertise in photo interpretation and photogrammetry (the disciplines he actually relied upon), the Plaintiffs' motion should be denied on its face. Even if the Plaintiffs had actually mounted a proper challenge to photogrammetry and Mr. Grip's expertise in photo interpretation and photogrammetry, the motion would fail for the reasons shown in this response. The Plaintiffs' motion should be denied.

Respectfully submitted,

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